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BEFORE THE
ILLINOIS COMMERCE COMMISSION

PRE-BENCH OPEN MEETING

Chicago, Illinois
October 6, 2009

Met, pursuant to notice at 1:30 p.m.

BEFORE:

MR. CHARLES E. BOX, Chairman
MS. LULA M. FORD, Commissioner
MS. ERIN M. O'CONNELL-DIAZ, Commissioner
MR. SHERMAN J. ELLIOTT, Commissioner

SULLIVAN REPORTING COMPANY, by
Patricia Wesley, CSR, RPR

1 CHAIRMAN BOX: Good afternoon. Is everything all
2 set in Springfield?

3 JUDGE WALLACE: Yes.

4 CHAIRMAN BOX: Pursuant to the provisions of the
5 Illinois Open Meetings Act, I now convene the
6 regularly scheduled pre-bench session of the
7 Illinois Commerce Commission.

8 With me in Chicago are Commissioners
9 Ford, and O'Connell-Diaz, and Elliott. I am
10 Chairman Box. We have a quorum.

11 Before moving into the agenda, this is
12 the time we allow members of the public to address
13 the Commission. Members of the public wishing to
14 address the Commission must notify the Chief Clerk's
15 office at least 24 hours prior to the bench session.
16 According to the Chief Clerk's office, there have
17 been no requests to speak.

18 We have one item on the agenda today,
19 Docket 08-0363, Northern Illinois Gas Company's
20 order on rehearing regarding its proposed general
21 increase in natural gas rates. The issue on
22 rehearing was whether the entire amount of

1 short-term debt should be imputed in the capital
2 structure or should a lesser amount be included in
3 the capital structure, if any.

4 Judge Sainsot and Judge Kimbrel are
5 with us.

6 JUDGE SAINSOT: Just to start off with, we are
7 required by law to tell you if there are any new
8 comments on rehearing. There are no new comments.

9 CHAIRMAN BOX: Thank you. Do you want to give us
10 a brief overview of the one issue in this particular
11 case?

12 JUDGE SAINSOT: Yes. This Commission granted
13 rehearing solely to determine whether the amount of
14 short-term debt that was included in Nicor's capital
15 structure in the final order in this docket was the
16 proper amount to include or whether a lesser amount
17 is in order. Implicit in this ruling is the
18 recognition of the fact that it is appropriate to
19 include some short-term debt in Nicor's capital
20 structure.

21 On rehearing, Nicor and staff chose not
22 to present any testimony, instead they stipulated to

1 the admission of certain data request responses into
2 evidence.

3 Also, on rehearing Nicor argued that if
4 the difference between this case and its previous
5 rate cases is inclusion of cash working capital in
6 its capital structure, then the amount of Nicor's
7 short-term debt should be limited to the amount of
8 its cash working capital.

9 The problem with that argument is that
10 Nicor, the party with the burden of proof, did not
11 present any evidence establishing that the amount of
12 its cash working capital is the same as the amount
13 of its short-term debt.

14 The significance of the fact that cash
15 working capital was included in Nicor's capital
16 structure is not the amount of its cash working
17 capital, rather it is that once Nicor placed cash
18 working capital in its cash capital structure, staff
19 investigated the sources of Nicor's cash working
20 capital.

21 That investigation led staff to
22 conclude that Nicor's short-term debt was the source

1 of Nicor's cash working capital. It also led staff
2 to conclude that Nicor fund rate base items were
3 short-term debt. There was no evidence presented on
4 rehearing indicating that staff was wrong.

5 On rehearing Nicor also argued that the
6 amount -- that most of its seasonal gas purchases
7 are investor financed; however, staff established,
8 through its discussion of rehearing Exhibit 4, that
9 because Nicor uses a type of last-in, first-out
10 accounting method, Nicor pays for this gas with
11 customer-supplied funds, and there's no evidence
12 indicating that staff is incorrect.

13 I should also point out to you that
14 also included in the order is a determination as to
15 the joint motion to reopen. Originally the final
16 order in this docket concluded that a rulemaking
17 should commence with the purpose of establishing
18 standards for gas efficiency programs. Since that
19 time, the General Assembly enacted Section 8-104 of
20 the Public Utilities Act.

21 The joint movant stated that,
22 therefore, a rulemaking on this issue was not

1 necessary and the order before you agrees with them,
2 and we should also remind you that if you change the
3 amount of short-term debt, then the appendix to the
4 original order would need to be changed, so you just
5 need to let us know so we can change the appendix.

6 Also, if the amount of short-term debt
7 is changed, Nicor will need a few days to re-file
8 its tariffs and that should be reflected in the
9 order.

10 Any questions?

11 CHAIRMAN BOX: Any questions from the bench?

12 (No response.)

13 I have a few. Judge Sainsot, could you
14 go through and just give me the differences between
15 this case and the three prior rate cases where
16 short-term debt was not imputed in the capital
17 structure.

18 JUDGE SAINOT: Well, there are a couple of
19 differences. One, the chief difference is inclusion
20 of cash working capital, because once -- in the
21 capital structure -- because once cash working
22 capital was included in the capital structure, then

1 staff took a look at what was in cash working
2 capital and that led staff to conclude that a
3 portion of cash working capital was short-term debt.

4 Also, in this case there was only three
5 months where Nicor had no short-term debt. In
6 previous cases there were many more months where
7 Nicor was found to have no short-term debt
8 whatsoever.

9 CHAIRMAN BOX: In any months at all?

10 JUDGE SAINSOT: Well, no, it had some. In the
11 last case I think it had five months with no
12 short-term debt whatsoever and the other seven
13 months it had short-term debt.

14 CHAIRMAN BOX: What about this particular case?

15 JUDGE SAINSOT: It has three months.

16 CHAIRMAN BOX: Didn't those cases say that's not
17 an indication of the fact that shareholder money was
18 being used and not ratepayer money so the point of
19 distinguishing the fact that there was no short-term
20 debt should not be included in short-term debt?

21 JUDGE SAINSOT: Well, obviously, shareholder
22 money would have been used during those three months

1 or those five months if short-term debt wasn't used.

2 COMMISSIONER FORD: I guess I had an issue,
3 because, as the Chairman said, that for the three
4 times we have included -- it's been included, and I
5 look back and see there in Black's Law where it says
6 legal precedent, and not being a lawyer and I was
7 wondering if those three times that the Commission
8 did include that we would be remiss if we did not
9 include it this time?

10 JUDGE SAINSOT: Well, you are quite right that to
11 pay attention to the precedent. The trouble is here
12 is that the facts are different, and when the facts
13 are different, you don't have legal precedence, and
14 that is discussed in the order before you.

15 CHAIRMAN BOX: Succinctly tell us what that
16 difference is, the actual difference?

17 JUDGE SAINSOT: Well, I just mentioned the other
18 two, the first two that come to mind. I believe
19 there are others in the order as well.

20 COMMISSIONER O'CONNELL-DIAZ: Well, "others"
21 meaning other cases?

22 JUDGE SAINSOT: No, other facts.

1 COMMISSIONER O'CONNELL-DIAZ: So there's three
2 months differences of utmost importance to your
3 recommendation?

4 JUDGE SAINSOT: No. The most important fact here
5 is staff's analysis of what was in cash working
6 capital, which was in the original testimony in the
7 case in chief before rehearing. That is the most
8 significant fact. We didn't have that in any other
9 case. We didn't have staff going through the cash
10 on hand -- what Nicor's cash on hand is, which is
11 what cash working is. It's not just an accounting
12 function. It is what the -- what cash Nicor has on
13 a daily basis, where that money comes from.

14 COMMISSIONER O'CONNELL-DIAZ: And I think the
15 most recent Commonwealth Edison case is the cash
16 working capital.

17 JUDGE SAINSOT: Right, but staff's analysis of
18 cash working capital led it to conclude in that case
19 that there was no short-term debt in cash working
20 capital.

21 COMMISSIONER O'CONNELL-DIAZ: It wasn't an
22 exhaustive review in that proceeding by staff.

1 JUDGE SAINSOT: Pardon me?

2 COMMISSIONER O'CONNELL-DIAZ: There was not an
3 exhaustive review of cash working capital by staff
4 in that proceeding.

5 JUDGE SAINSOT: I don't know. All I know is
6 looking at the order there was no mention. You have
7 a better feel for that than I would.

8 CHAIRMAN BOX: Commissioner Elliott.

9 COMMISSIONER ELLIOTT: I just have got a comment.
10 It seems the distinctive difference is an exhaustive
11 study analysis performed in this proceeding with
12 regard to that issue. It seems to be a perfunctory
13 look at short-term debt and the amount on hand month
14 to month in the prior cases. It seems to be quite
15 different.

16 JUDGE SAINSOT: Well, and I would also point out
17 that gas in and of itself is much more seasonal than
18 electricity and staff has talked exclusively about
19 the need for short-term debt due to the seasonal
20 nature of gas purchases and use of gas.

21 CHAIRMAN BOX: In Peoples' last rate case, their
22 short-term debt was zero, wasn't it?

1 JUDGE SAINSOT: That's correct, and North Shore
2 too, which was part of that case.

3 CHAIRMAN BOX: And that was zero because did the
4 staff do an exhaustive review in that particular
5 case to see if, in fact, short-term debt existed or
6 not or just --

7 JUDGE SAINSOT: Either that or Peoples had no
8 short-term debt and Peoples handled its finances
9 differently. That's the only thing I can think of.

10 COMMISSIONER O'CONNELL-DIAZ: Didn't the
11 Commission reject the theory on four different
12 occasions in four different matters that we had
13 before us?

14 JUDGE SAINSOT: Well, it rejected it in the last
15 two Nicor rate cases, that is true; however,
16 factually I think we have a different situation,
17 otherwise, we wouldn't be here.

18 COMMISSIONER O'CONNELL-DIAZ: Whose testimony can
19 I look to to support the staff's exhibit -- the LIFO
20 analysis that you refer to in your --

21 JUDGE SAINSOT: There is no testimony on that.
22 That was part of the evidence that was stipulated

1 to. There's absolutely no testimony on that that I
2 can recall. No, that's not true actually.

3 Mr. Arbushaw (phonetic) testified as to that
4 procedure, but staff's particular analysis comes
5 from what was stipulated into evidence on rehearing.

6 COMMISSIONER FORD: Well, except when short-term
7 debt can be traced to a particular asset, then it's
8 treated in the same manner as long-term debt. I
9 guess I had questions along -- issues along those
10 lines because it seems that in our other cases --
11 the three other cases you did not bring all that
12 into the factual component of the case. That's why
13 I'm having an issue with this.

14 If a child gets an F three times and --
15 I mean an A three times and comes back and gets an
16 F, I want to have substantial reasons, and you are
17 saying that Nicor did not present evidence that they
18 did not track a short-term debt?

19 JUDGE SAINSOT: Yes, that's correct. That's not
20 the only thing we are stating here, but that's
21 correct. I'm not saying that Nicor has to track its
22 debt.

1 What we are saying here is that it
2 would be a lot easier if for Nicor or any other
3 utility in the future if they found a way to track
4 its debt. That's all.

5 COMMISSIONER O'CONNELL-DIAZ: But to disallow the
6 totality of what Commissioner Ford was referring to
7 as a kind of precedent that I'm just -- it's not
8 clear to me that there's a procedural evidentiary
9 record in this matter to lead us to that place and
10 that there should be somewhat of an apportionment,
11 and if that's the way the Commission is going to be
12 looking at this issue you have noted, maybe we need
13 to signal that, but there's just a whole host of
14 cases where short-term debt has been treated in the
15 manner that the Commission has treated it and so
16 that becomes to me, the regulatory certainty. I
17 just don't see anything in this record that wins me
18 over to the other side.

19 That being said, you know, I'm thinking
20 there should be a middle ground as opposed to this
21 all or nothing, which that is the problem that I
22 see, and I would prefer to see a middle ground, and

1 if this is the way the Commission's going to be
2 looking at this as our determination, then we should
3 signal to our companies that they need to start
4 keeping their records in a different manner than
5 they have if we are going to be looking at it like
6 this.

7 It's very clear to me from
8 Mr. Arboushaw's testimony in the case in chief,
9 which, you know, led right into the reopening that
10 with these monies there is a three-month period that
11 due to the seasonal fluctuation of the business that
12 they're in.

13 We can do all sorts of different kinds
14 of analyses and hypotheticals, but that doesn't give
15 me comfort on the facts level that this is
16 appropriate nor legally sustainable, and so, you
17 know, I understand it.

18 I think we are in a situation where
19 obviously the books and records are not kept in the
20 manner that I think staff would like them to be, so
21 maybe we need to signal that, but this all or
22 nothing I think is really --

1 COMMISSIONER ELLIOTT: On the other hand, I think
2 we did just exactly that in reopening.

3 I thought that our judge's opening
4 statement with regard to what was requested to be
5 provided, and the company provided no evidence with
6 regard to anything other than the total.

7 COMMISSIONER O'CONNELL-DIAZ: I believe because
8 these amounts are fungible, which is webbed through
9 all the testimony, that there's a problem of
10 producing a document that's got these numbers and
11 where it went and how that was tracked. I think
12 that --

13 JUDGE SAINSOT: Well, I didn't mean to interrupt
14 you. I'm sorry. I'm sorry.

15 COMMISSIONER O'CONNELL-DIAZ: So I just think
16 that that presents the problem. If we are going to
17 be requiring our companies to do that, then I think
18 we should give them a signal to do that and I think
19 -- also, staff's position I think we could have
20 gotten a better argument that there was some portion
21 but they just weren't sure what it was, so I guess
22 it's up to us to determine what's fair and

1 reasonable and also what we could -- how we could
2 get to a legally sustainable order. I just find
3 this should be really an about face as to how we
4 have dealt with it in most of the recent rate cases
5 which had had cash working capital, so, you know,
6 I --

7 COMMISSIONER ELLIOTT: I think in my review I
8 don't think there's any question, there's no doubt,
9 that the company has short-term debt in its capital
10 structure. The question is whether they utilize
11 that short-term debt to fund rate base assets, and I
12 think that's the difference in the analysis
13 performed in this case that is different from the
14 analysis performed in the other cases as to whether
15 or not there's been any relationship and that's the
16 analysis in the cash working capital that was not
17 performed in those prior cases and I think that
18 distinguishes this case from the others.

19 Now to the regard with if there's some
20 level under the totality again, it's Nicor's burden
21 to provide that evidence, and I think your
22 statements here is that that evidence was not

1 provided and that's sort of where I'm at. They have
2 had not only the opportunity in the case in chief
3 but rehearing.

4 CHAIRMAN BOX: You just started saying something
5 earlier. What were you saying?

6 JUDGE SAINSOT: Well, I'm sorry. Again, I didn't
7 mean to interrupt anyone. There's no evidence here
8 that it couldn't have been some testimony or like
9 evidence about pattern and practice that when we get
10 this kind of a situation this is how we function.
11 It would have been a simple matter to do.

12 There's no evidence here as to that.
13 What we do have is Nicor saying, well, you know, the
14 monies all over the place. Well, in reality they
15 probably do -- for the margin calls, for example,
16 they probably do go to certain place when they have
17 margin calls and that would have been a very simple
18 thing to do, and it wasn't done.

19 CHAIRMAN BOX: So does it concern you at all that
20 if we are talking about LIFO, and FIFO, and
21 accounting procedures, to see a company go from zero
22 percent short-term debt in their capital structure

1 to 19 percent if my numbers are right? Does that
2 cause you some pause?

3 JUDGE SAINSOT: Yes. And I was kind of shocked
4 that Nicor chose not to present testimony and just
5 stipulated to the admission of data request
6 responses.

7 CHAIRMAN BOX: The staff thought that the
8 position didn't have to be all or nothing and the
9 company puts forth a compromise position and that
10 was not acceptable to you in your order either.

11 Was there any particular reason why
12 given the fact that going from zero to 19 to the
13 fact that the last three cases we ruled a certain
14 way and we haven't signaled anything? Staff never
15 agreed with that, but I think that's something we
16 have to take up later, too, that when -- I think we
17 talked about this at the oral argument, that when I
18 asked for precedence, I was given a list of cases
19 that the staff had taken a certain position and the
20 last time I checked that's not precedent.

21 I wanted to know how the Commission
22 ruled and it just seems like maybe I shouldn't say

1 staff is lying in wait for something like this where
2 Peoples is zero, Com Edison is zero, and I've never
3 seen a company's short-term debt at 19 percent.

4 COMMISSIONER FORD: And I'm looking at the
5 conclusion in 9-507 (phonetic) that says to me
6 included -- short-term debt should be included in
7 the company's capital structure adopted in this
8 procedure. Short-term debt is used as a source of
9 financing assets in rate base.

10 So when we come to those kinds of
11 conclusions and our failure to include it
12 understates (sic) the amount of the cost of debt,
13 that supports the company's rate base. This is from
14 our own dockets. Not being a lawyer, I'm just being
15 able to analyze and synthesize some information.

16 COMMISSIONER O'CONNELL-DIAZ: I guess the other
17 part I'm trying to keep in my mind is short-term
18 debt is more expensive than long-term debt.
19 Short-term debt actually helps the company's bottom
20 line and, in fact, helps the rates be lower, so for
21 us to discourage usage of short-term debt and
22 encourage or disallow that I think is not an

1 appropriate thing because at some point in time that
2 will have an effect on the bottom line, so I think
3 Commissioner Ford's statement that she just read
4 from one of our other dockets is totally on board
5 and on point.

6 Again, to go back to the testimony that
7 was given by the company in Exhibits 24.1, 24.2,
8 Exhibit 3, I don't know if they have anything more
9 than what they gave in the first round because these
10 are fungible.

11 We know they had zero balances three
12 months of the year. In the other cases that the
13 Commission has approved it was four months and seven
14 months, so I think we get into semantics in regard
15 to that.

16 In other company cases, other than
17 Nicor, have a lot of this short-term debt and most
18 recently Com Ed, and although I think Peoples, as
19 Commissioner Elliott pointed out, wasn't heavily
20 litigated, I don't know if there was an agreement,
21 but short-term debt is utilized during the seasonal
22 fluctuation and I think that hitting the bottom line

1 keeps prices and keeps the company in a good
2 financial picture which is important for customers.

3 So for us to do an about face without
4 having the absolute concrete evidence in a record to
5 me that's troubling, so I think we know it's not a
6 hundred percent. It's not -- to me, I think it
7 should be some middle place that we might find
8 ourselves would be a reasonable conclusion for this
9 situation.

10 CHAIRMAN BOX: Does the record include latitude
11 for something other than zero or all?

12 JUDGE SAINSOT: I really wish it did. The only
13 thing that we thought represented a middle ground
14 was reducing it to the amount of Nicor's cash
15 working capital.

16 The problem with that is that Nicor's
17 cash working capital is not the same as it's
18 short-term debt and there's no indication that they
19 equate each other in that way. They're two separate
20 entities, but that would be it.

21 CHAIRMAN BOX: Any other questions of the judge?
22 No comments or questions?

1 (No response.)

2 This is on our agenda for tomorrow. I

3 think the deadline is the 7th at our 10:30 meeting.

4 Thank you. Appreciate it.

5 Judge Wallace, anything else to come

6 before us?

7 JUDGE WALLACE: Nothing.

8 CHAIRMAN BOX: Thank you. The meeting is

9 adjourned.

10 (Whereupon, the above
11 matter was adjourned.)

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1 No. 08-0363

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3 State of Illinois
4 ILLINOIS COMMERCE COMMISSION
=====

5 (To be filed with the Chief Clerk)

6 MINUTES

7 Chicago, Illinois

8 October 6, 2009

9 Case No. 08-0363

10 Subject: PRE-BENCH OPEN MEETING

11 HEARD BY: MR. CHARLES E. BOX, Chairman
MS. LULA M. FORD, Commissioner
12 MS. ERIN O'CONNELL-DIAZ, Commissioner
MR. SHERMAN J. ELLIOTT, Commissioner

13 APPEARANCES AND ADDRESSES:

14 (None.)

15 DISPOSITION: Adjourned.

16 EXHIBITS FILED: (None.)

17 REPORTED BY: SULLIVAN REPORTING COMPANY, by
18 Patricia Wesley

19 REMARKS: Orig to Commission
Pages 1-22 (22pgs)

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